not create a property interest; and (d) a limitation on the use of a cash deposit is not a taking.

a. A Cash Bail Deposit Is A Matter Of Contract And Does Not Raise Fifth Amendment Concerns

As the California Court of Appeal recognized, "[a] bail transaction is a contract." App., p. 13. Therefore, the obligations of the parties are defined by contract. Because the parties' contractual terms here did "not require the payment of interest on cash bail deposits," no interest is owed. App., p. 15.

> "Thus, the quid pro quo for the cash bail deposits which were posted herein was the release of the criminal defendants from custody. The contracts did not include a provision that petitioners would earn interest on the cash bail deposits. Now, after the bail was exonerated, petitioners would have the contracts rewritten to award them additional consideration in the form of interest on the bail between the date of deposit and the date of exoneration. Such a modification has no basis in contract law and must be rejected." App., p. 15.

Petitioners deposited cash in lieu of bail in order to gain their clients' liberty pending their clients' trials. Petitioners made these deposits without any contractual provision that they would be paid interest. Petitioners cannot now modify the terms of the agreement into which they voluntarily entered.

b. Petitioners Had No Property Right To Interest Earned On Cash Bail Because As A Term Of Bail, Petitioners Voluntarily Gave Up Possession, Control And Use Of The Cash

Property "consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of'" the property. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 170 (1998), citing *United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945).

Here, Petitioners possessed none of the critical "group of rights" to the cash deposits at issue here. Significantly, Petitioners no longer had the "right to use" the cash. Bail would not be bail if a criminal defendant could still use the property. So, a defendant cannot invest the cash, cannot buy stock with the cash, and cannot put the cash into the bank to earn interest.

As this Court has already accurately observed, when cash is deposited as bail, the depositor loses the right and opportunity to earn interest:

> "One who deposits securities or encumbers his real estate precludes the use of that property for other purposes. And one who deposits the full amount of his bail in cash is dispossessed of a productive asset throughout the period of the deposit; presumably, at least, its interim possession by the State accrues to the benefit of the State." *Schilb v. Kuebel*, 404 U.S. 357, 367 (1971).

Petitioners did not have a property right to any earned interest because Petitioners voluntarily gave up their right to use the cash while it was being held as a deposit in lieu of bail.

c. Petitioners' Unilateral And Unfounded Expectation Does Not Create A Property Interest

"[A] mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

Here, Petitioners did not even have a unilateral expectation of receiving interest on cash deposited in lieu of bail. The interest would not belong to Petitioners because the principal did not belong to Petitioners. Therefore, Petitioners would not be entitled to interest under any scenario.

Even if the cash belonged to Petitioners, they still would not have an expectation of receiving interest. Nothing in California's statutory bail scheme nor in its documentation would lead anyone to believe that interest would be paid on bail. Indeed, for hundreds of years, precisely the opposite has occurred.

In *Webb's*, the creditors did have "more than a unilateral expectation" because the interpleaded funds at issue there were "held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county." *Ibid.* Here, the precise opposite is true: bail is not held solely for the benefit of the criminal defendant. Bail is held "for the benefit of the court" and "for the benefit of the county" in order to offer some guarantee that the criminal defendant will appear for trial. Thus, the California Court of Appeal recognized that "the *public purpose* of bail justifies the denial to the owner of the beneficial use of the money while it is on deposit with the court." *Fresno Fire Fighters Local 753 v. Jernagan*, 177

Cal.App.3d 403, 412 (1986); italics in original, citations omitted.

The criminal defendant has a reasonable "expectation" of being released if the proper bail is posted but the criminal defendant does *not* have an expectation of making a reasonable rate of return on the posted cash. Bail is not an investment opportunity.

d. A Limitation On The Use Of A Cash Deposit Is Not A Taking

This Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values" without effecting a taking. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

> "The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002).

Thus, it does not amount to a "taking" for the government to prohibit landlords from evicting tenants who are unwilling to pay a higher rent. *Block v. Hirsh*, 256 U.S. 135 (1921). In *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), it was not considered a "taking" for

the government to require certain gold mines to cease operations during wartime.

Similarly, there is no "taking" when the government bans certain private uses of a portion of private property. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). A government can also, without effectuating a "taking," ban private use of certain airspace. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

Here, there is no Fifth Amendment concern because there was no "taking." At best, the government only has prohibited a criminal defendant "from making certain uses of her private property." Specifically, a criminal defendant cannot buy stock with money used to post bail. A criminal defendant cannot put such money in the bank. Instead, a defendant's "use" of the money is limited to being held by the court while the criminal defendant waits for trial.

Moreover, when a person deposits cash into a checking account which bears no interest according to the terms of the contract agreed to by the depositor and the bank, the depositor cannot be heard to complain that the bank used the deposited funds to earn interest for the bank only.

So too here. Certain criminal defendants were given the option of remaining in custody until trial or posting sufficient bail so as to give some guarantee of the criminal defendant's appearance at trial. No California criminal defendant is given the option of posting bail with interest being earned thereon.

e. No Just Compensation Is Owed To Petitioners

> "While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Found.*, 538 U.S. 216, 231-232 (2003).

Often referred to as the Just Compensation Clause, the final Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." *Ibid.*, at n. 6.

Here, even assuming a taking, still no just compensation would be owed.

When a criminal defendant is allowed to post bail, the defendant has several available options. Which one of the following the criminal defendant chooses is entirely up to the defendant:

- The criminal defendant can use a bail bond company, thereby not having to come up with the entire amount of the bail. Bond companies, however, charge a price for their services – a rate of 10% of the amount of the bail is not surprising and still, the entire amount must be collerarized. Significantly, the 10% fee is irretrievable.
- The criminal defendant can post a property bond, up to 200% of the bail required – and not have to part with the use of any money.
- The criminal defendant can borrow money such that the entire bail amount can be posted without any outlay by the criminal

defendant. (The courts have no way of tracing the source of the cash posted.)

- The criminal defendant can use his/her own money and deposit with the court the entire amount of the bail. When using this option, the defendant is able to avoid a bond fee or burdening a friend/relative but does lose the beneficial use of the money while it is being held as bail.

Here, Petitioners suffered no pecuniary loss. If, for example, defendant Mr. Alkhelaifi had used a bail bond company instead to post his $500,000 bail, the bail bond company would have charged 10% – i.e., $50,000. This fee would have been nonfundable – gone whether the bond was posted for one day or one year. Instead of a guaranteed loss of $50,000, Petitioners admit that "the Overland deposit . . . likely earned nearly $25,000 in interest." Thus, there was a net *savings* of $25,000 by depositing cash with the court rather than using a bond company. Alternatively, Defendant Alkhelaifi could have used a property bond which would have cost next to nothing. Or, the criminal defendant could have remained in custody, also an option which would have caused no pecuniary loss.

Petitioners never had a contractual, a constitutional or a property right to earn interest on cash deposited in lieu of bail. Therefore, there was no "taking" to implicate the Fifth Amendment.

CONCLUSION

The constitutional concerns implicated by the Fifth Amendment do not arise here not only because Petitioners lack standing but also because there has been no taking for which just compensation would be due.

Respectfully submitted,

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In The
Supreme Court of the United States

MARK E. OVERLAND, PAMELA POLOSKI, and OVERLAND & BORENSTEIN LLP,

Petitioners,

v.

COUNTY OF LOS ANGELES and SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District

RESPONSE TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. PETITIONERS HAVE STANDING	2
A. The County Respondents Object to Petitioners' Standing for the First Time in This Court on the Basis of Unsupported Facts	2
B. Even if This Court Considered the Standing Issue on the Basis of the Unsupported Facts, Petitioners Obviously Have Standing	2
II. THERE WAS A "TAKING" IMPLICATING THE FIFTH AMENDMENT	6
A. The Interest Earned on the Cash Bail Deposit Is An Interest in Petitioners' Property	6
B. Petitioners Have a Property Right to Interest Earned on Cash Bail Deposit	7
C. Petitioners' Rights to Interest is Not Based on a Unilateral and Unfounded Expectation	8
D. The Taking in This Case is Not a Regulatory Taking	9
E. Petitioners are Owed Just Compensation	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003) 4, 6, 9

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) 6, 7, 8, 9

Schilb v. Kuebel, 404 U.S. 357 (1971) 7, 8

Schneider v. California Department of Corrections, 345 F.3d 716 (2003) 6

Washington Legal Foundation v. Legal Found. of Washington, 271 F.3d 835 (9th Cir. 2001), *aff'd*, 538 U.S. 216 (2003) 4, 5

Webb's Fabulous Pharmacy, Inc. v. Beckwith, 449 U.S. 155 (1980) 6

STATE CASES

Breda Costruzioni Ferroviane v. Los Angeles County Metro. Trans. Auth., 56 Cal. App. 4th 1433 (1997) 7

Builders' Control Service, Inc. v. North American Title Guaranty Co., 205 Cal. App. 2d 68 (1962) 5

Fresno Fire Fighter Local 753 v. Jernagan, 177 Cal. App. 3d 403 (1986) 8, 9

Lee v. Wrixon, 37 Wash. 47 (1905) 5

Overland v. Superior Court, 126 Cal. App. 4th 131 (2005) 3, 9

Pomona City Sch. District v. Payne, 9 Cal.App.2d 510 (1935) 7

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES AND AUTHORITIES

4 Witkin, Cal. Proc. Pleading § 104 (4th ed. 2004) 5

Alaska Rules of Court, Rule 41(d) (Alaska 2005); Colo. Rev. Stat. § 16-4-109 3

Cal. Penal Code § 1188 4

Cal. Penal Code § 1297 4

Cal. Penal Code §§ 1305-1308 8

Cal. Civil Procedure Code § 367 5

Cal. Civil Procedure Code § 368 5

Cal. Civil Procedure Code § 368.5 5

Idaho Code § 19-2923 3

N.J. Stat. Ann. § 3:26-4 3

N.Y. Crim. Proc. Law § 520.15(c) (New York 2005); Pa. Stat. Ann. tit. 234 § 535 3

W. Va. Code § 62-1C-12 3

INTRODUCTION

The arguments by Respondents County of Los Angeles and J. Tyler McCauley (the "County Respondents") for denial of the Petition are without merit and should be rejected. First, there is no legitimate standing objection here. The argument has *never* been raised before and there are no facts in the record that would support the wild allegations made by opposing counsel. Here, the *statute* which establishes cash bail deposits and requires its return to the person who deposited the cash, unambiguously gives the right to receive the principal amount of the cash bail *to the depositor.* Each of the Petitioners and every member of the class they represent was a cash bail depositor, who received back from the Respondents the principal amount of the deposit, but without the accrued interest, after the trial court exonerated the bail. Petitioners obviously have standing since they are persons on whom the statute confers standing.

None of Respondents' arguments on the merits withstand scrutiny. They amount to little more that repeated quotations from the Court of Appeal decision below. In contrast to a bail bond, there is no express or implied contract, and the precedents of this Court unquestionably establish that the interest earned belongs to the depositor of the principal which earned the interest. This is not a case about a potential "investment opportunity" by defendants, Opposition at 1, clever as that phrase is. Rather, it is a compelling example of a *per se* taking of personal property, used by the state for what may be a laudable purpose, but in circumstances where the social benefit of general fiscal relief is not properly born by a discrete minority comprised of cash bail depositors. The Petition should be granted.

I. PETITIONERS HAVE STANDING.

A. The County Respondents Object to Petitioners' Standing for the First Time in This Court on the Basis of Unsupported Facts.

This Petition challenges the California Court of Appeal's refusal to overturn the trial court order sustaining the demurrer to Petitioners' complaint, *brought by other parties*. The County Respondents did not file a demurrer to Petitioners' state court complaint which, like a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, challenges the legal sufficiency of the complaint. Instead, the County Respondents answered the complaint. In their answer, the County Respondents alleged several affirmative defenses, but did not assert in their answer, or in any of their subsequent papers in the courts below, that Petitioners lacked standing. *See* Answer of Defendants J. Tyler McCauley and the County of Los Angeles, filed on March 14, 2004. Nor did any of the other Respondents.

The claim that Petitioners lack standing is based solely on the County Respondents' recitation of unsupported alleged facts. On this basis alone, the Court should reject any alleged facts that are not in any of the opinions below and are not brought to this Court's attention by citation to the record below.

B. Even if This Court Considered the Standing Issue on the Basis of the Unsupported Facts, Petitioners Obviously Have Standing.

None of the Respondents ever objected to Petitioners' standing for very good reason! As the Court of Appeal recognized, the Petitioners (and the class of cash bail

depositors they represent[1]), have pleaded that they made cash bail deposits and Respondents failed to return those deposits with the actual earned interest in violation of the Fifth and Fourteenth Amendments. *See Overland v. Superior Court*, 126 Cal. App. 4th 131, 134-35 (2005); Pet. App. 2-6. Under California law, these allegations must be accepted as true for purposes of demurrer, and the Court of Appeal did so. *Id.* at 6. This Court should do likewise. The allegations in the complaint unquestionably establish standing, for pleading purposes, since they seek the interest earned on the cash deposits each Petitioner made and which must be returned to them by statute.

The County Respondents claim that Petitioners lack standing because they are not the "owners" of the cash bail deposited and therefore have suffered no cognizable injury. Opposition 3-6. But under the California bail statutes, just like in other states[2], the person to whom Respondents are *statutorily mandated* to return exonerated cash bail is the cash bail *depositor*. No one else can claim the cash deposit

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[1] The Court Respondents statement that "Petitioners did not pursue class certification," Opposition at 2, is curious since the entire case was stayed in the trial court, pending final review of the demurrer ruling, so that there has been no opportunity to move for class certification. *See* Order Staying Action Pending Ruling on Plaintiffs' Petition for Writ of Mandate, filed July 27, 2004. The County Respondents' complaint that "there has never been any evidence to support" Petitioners' claim that "there are more than 1 million cash bail depositors subject to this litigation," is disingenuous. In related litigation, the County Respondents acknowledged that during a shorter period of time than covered by this litigation, there were more than 750,000 cash bail depositors in Los Angeles County who were not paid interest on their cash bail deposit. *See John C. Clarke v. Superior Court*, Cal. Ct of Appeal B166922 (2d Dist.), County Respondents' Petition for Writ of Mandate denied 5/15/03.

[2] *See, e.g.*, Alaska Rules of Court, Rule 41(d) (Ala. 2005); Colo. Rev. Stat. § 16-4-109 (Colo. 2005); Idaho Code § 19-2923 (Idaho 2005); N.J. Stat. Ann. § 3:26-4 (NJ 2005); N.Y. Crim. Proc. Law § 520.15(c) (NY 2005); Pa. Stat. Ann. tit. 234 § 535 (PA 2005); and W. Va. Code § 62-1C-12 (W. Va. 2005).

and the statute does not authorize any inquiry by Respondents into how the depositor acquired the cash or what the source of the cash was. For example, California Penal Code section 1297 provides in part:

> When money has been deposited, a receipt shall be issued in the name of the *depositor*. . . . If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall be returned to that person within 10 days after the person claims it by submitting the receipt, and, if a claim is not made within 10 days of the exoneration of bail, the clerk shall immediately notify the *depositor* of the exoneration of bail.

Cal. Penal Code § 1297 (2005) (emphasis added). *See* Cal. Penal Code § 1188 (trial court is required to refund the deposit to "the person or persons found by the court to have deposited said money on behalf of said defendant.")

The County Respondents' admission that Petitioners have asserted "they deposited cash," Opposition at 5, establish the very injury in fact they claim Petitioners lack. Petitioners have been deprived of the return of interest on the cash that state law mandates be returned to them. At the least, these facts alone establish "an invasion of a legally protected interest," Opposition at 3, namely the refusal to return interest (which this Court has repeatedly declared "follows principal," *see* Pet. at 9-14 and Section II(A) *infra*), where state law demands that the principal promptly be returned to them, *as the depositor.*

Respondents mistakenly rely on the Ninth Circuit opinion in *Washington Legal Foundation v. Legal Found. of Washington*, 271 F.3d 835 (9th Cir. 2001), *aff'd, Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003). The circuit court rejected the standing of an escrow agent who had "legal title" to the principal in the escrow account because, under Washington law, "legal title" did not

include "any valuable beneficial interests. *See, e.g., Lee v. Wrixon*, 37 Wash. 47, 79 P. 489, 490 (1905)." *Washington Legal Foundation v. Legal Found. of Washington*, 271 F.3d at 848.

Under California law, however, Respondents have the duty to return cash bail to the *depositor*. If the depositor and the owner are different, state law mandates that the cash bail is returned to the depositor. It is therefore the *depositor*, unlike the escrow agent in Washington State, who suffers injury when deprived of the interest on the returned cash bail deposit.

In addition, the County Respondents refer to California Civil Procedure Code section 367 which establishes that all civil actions must be prosecuted by "the real party in interest." *See* Opposition at 3-4. But that statute recognizes that any party who is beneficially interested in the controversy satisfies the "real party in interest" requirement. So, for example, an assignee of a litigation claim satisfies the "real party" requirement, *see* Cal. Civ. Proc. Code §§ 368 and 368.5; *Builders' Control Service, Inc. v. North American Title Guaranty Co.*, 205 Cal. App. 2d 68, 76 (1962), as do those persons who have a right to sue under the substantive law. *See* 4 Witkin, Cal. Proc. Pleading § 104 (4th ed. 2004). Under the substantive law, only the cash bail depositor can enforce that statutory duty to return the bail deposit. Petitioner Overland's standing also rests on the assignment for value of the litigation claim against Respondents, information previously provided to counsel for the County Respondents.

As Respondents concede, Petitioners have established they each deposited the cash in question, and they were unconstitutionally deprived of the interest thereon. They have suffered "an injury in fact."

II. THERE WAS A "TAKING" IMPLICATING THE FIFTH AMENDMENT.

A. The Interest Earned on the Cash Bail Deposit Is An Interest in Petitioners' Property.

Respondent argues that there can be no Fifth Amendment Taking because of the "implied contract" found by the Court of Appeal that does not require the payment of interest on cash bail deposits. Opposition at 7. However, they cite to nothing more than the Court of Appeal decision which is the subject of this Petition.

In any event, the argument ignores, as the Court of Appeal did, this Court's explicit holding in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). In *Phillips*, the Texas IOLTA rules specifically divested clients of the interest income in the IOLTA accounts. Nevertheless, this Court held that "a State, by *ipse dixit*, may not transform private property into public property without compensation simply by legislatively abrogating the traditional rule that earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 167, *citing Webb's Fabulous Pharmacy, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (internal quotes omitted).

Here, the Court of Appeal does exactly that – convert by judicial fiat the interest actually earned on the cash bail deposit into public property, thereby purporting to bypass completely the Fifth Amendment. The very same implied contract analysis could have converted to public money the interpleader cash in *Webb's Fabulous Pharmacy*, or in the inmate funds in *Schneider v. California Department of Corrections*, 345 F.3d 716, 718 (9th Cir. 2003), or even the IOLTA deposits in *Brown* and *Phillips*. The designation of the arrangement as an implied contract does nothing more than "transform private property into public property without compensation."

The County Respondents fail to point to any exception to the general rule established in the common law since the mid 1700's that "interest follows principal." *See Phillips*, 524 U.S. at 165. Indeed, California is in accord with the unanimous endorsement of this principle by American courts. *See Breda Costruzioni Ferroviane v. Los Angeles County Metro. Trans. Auth.*, 56 Cal. App. 4th 1433, 1439 (1997); *Pomona City Sch. Dist. v. Payne*, 9 Cal. App. 2d 510, 516 (1935).

B. Petitioners Have a Property Right to Interest Earned on Cash Bail Deposit.

In support of their argument that Petitioners have no property right to interest earned on cash bail, Respondents cite to this Court's decision in *Schilb v. Kuebel*, 404 U.S. 357 (1971). Opposition at 8. *Schilb* was *not* a takings decision at all and did not consider any challenge on that basis. Instead, on due process and equal protection grounds – issues not asserted by anyone in this case – the Court held that Illinois did not offend due process and equal protection rights when it provided bail through a number of different statutory schemes which had different economic consequences to the person seeking release on bail. Undoubtedly, the California statutory scheme, like the Illinois bail system in *Schilb*, passes due process and equal protection muster. But that concession says nothing whatever about the County Respondents confiscating actually earned interest and thereby violating the takings clauses of the California and United States Constitution.

The Court noted in passing that under the cash bail deposit part of Illinois' bail statutes that "presumably, at least, its interim possession by the State accrues to the benefit of the State." *Id.* at 367. This statement merely states the obvious – from the date the cash bail is deposited until its mandated return, the State holds the cash deposit as security for the appearance of the defendant.

Thus, like any pledge of security, the incidents of possession are temporarily impaired. But the implication of this *dicta* is that the interference with the principal sum of cash is temporary and that the depositor's underlying *ownership* is not compromised. Indeed, the depositor's ownership cannot be divested in Illinois, or in California, unless and until statutorily mandated judicial forfeiture has occurred. *See* Cal. Penal Code §§ 1305-1308; 725 Ill. Comp. Stat. § 5/110-8(g).

Besides, no one is challenging the interference with the *principal* which plainly occurs. The only challenge made here is to the *interest* earned on the principal, which is not included in the bail amount and is not impaired. Certainly there has been no contention by any of the Respondents that the interest earned becomes part of the security for the defendants' appearance. Moreover, nothing in the statement in *Schilb* undercuts the "interest follows principal" rule and it is certainly not a holding by this Court that the depositor has lost all property rights in the deposit.

C. Petitioners' Rights to Interest is Not Based on a Unilateral and Unfounded Expectation.

Petitioners' right to the interest actually earned is based on California's and the common law's long-standing rule that "interest follows principal." *See Phillips*, 524 U.S. at 165. It is not an "unfounded expectation."

Nor does the right to their property turn on whether the interest is taken for a good "public purpose," citing *Fresno Fire Fighter Local 753 v. Jernagan*, 177 Cal. App. 3d 403, 412 (1986). A public purpose is a necessary condition for lawfully exacting a *per se* taking of private property, but the public purpose does not excuse compliance with the Fifth Amendment and the payment of just compensation. Here, just like in *Brown* and *Phillips*, there was